

CHAPTER 25

SENIOR OFFICER LEGAL ORIENTATION

LAW OF FEDERAL EMPLOYMENT

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Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

- A. Statutes: Title 5, United States Code, section 1101 *et seq.*
- B. Office of Personnel Management (OPM) Regulations: Title 5, Code of Federal Regulations (CFR).
- C. Army Regulations: Civilian Personnel Regulations and AR 690-xxx series.

III. THE ROLE AND FUNCTIONS OF CIVIL SERVICE AGENCIES.

- A. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.
- B. Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1201-1209.
- C. Office of Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.

IV. INSTALLATION LEVEL PLAYERS.

- A. The Role of the Military Lawyer--The Labor Counselor Program.
- B. The Civilian Personnel Office.
 - 1. Traditional organization had four divisions: Position and Pay Management Division (PPM); Recruitment and Placement Division (R&P); Management-Employee Relations Division (MER); and Training and Development Division (T&D).

- 2. Army CPO Regionalization: New w
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a. CPOCs.

b. CPACs.

V. FEDERAL CIVILIAN EMPLOYMENT.

A. Employees--Classified by Type of Appointment:

1. Competitive Service.

2. Excepted Service.

3. Senior Executive Service.

B. Employees--Classified by Tenure Status.

1. Requirement for probationary period. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.801-315.806.

2. Tenure upon appointment: career-conditional. 5 C.F.R. § 315.301.

3. Probationary period for excepted service positions. 5 U.S.C. § 7511(a)(1)(C).

4. Probationary period for military technicians. *Hintz v. Dep't. of Army*, 21 F.3d 407 (Fed. Cir. 1994).

5. Probationary period for new supervisors. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.901-315.908; AR 690-300, ch. 315, subch. 9.

C. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.

1. General schedule employees. 5 U.S.C. Chapters 51 and 53. GS-1 - GS-15.

2. Prevailing rate employees (wage board). 5 U.S.C. §§ 5341-5349. WG-1 - WG-15.
3. Senior Executive Service (SES) employees. 5 U.S.C. §§ 5381-5385. ES-1 - ES-6.
4. Executive Schedule. Levels I - V.
5. Nonappropriated fund employees (AR 215-3): Those employees who are not paid from funds appropriated by Congress.
6. Other personnel.

VI. APPEAL AND GRIEVANCE RIGHTS DEPEND ON:

- A. Type of action,
- B. Collective bargaining agreement, and
- C. Employee status.

VII. EMPLOYEE PERFORMANCE.

- A. Performance Appraisal System -- Total Army Performance Evaluation System (TAPES). AR 690-400, Ch. 4302.
- B. Actions for Unacceptable Performance (Performance-Based Actions).
 1. Counseling.
 2. Reassignment.
 3. Reduction in grade.

4. Removal.

C. Proof Requirements.

1. Performance appraisal system approved by OPM.
2. Employee given written notice of performance standards. Standards themselves are subject to review and challenge.
3. Employee given notice of performance deficiencies.
 - a. Written notice.
 - b. Note oral notice on SF 7-B; prepare MFR on discussion.
4. Employee given reasonable time to improve.
 - a. Opportunity to improve must be meaningful.
 - b. Employee improvement during "performance improvement period" (PIP). 5 C.F.R. § 432.105. Employee must maintain acceptable performance for 1 year from beginning of PIP or no new PIP is required.
5. Employee's performance remains unsatisfactory.
 - a. Employee Evaluation Report.
 - b. Examples of employee's work product.
 - c. SF 7-B with supplemental MFRs reflecting assistance to employee during PIP.
 - d. Supervisor's explanation.

6. Followed proper procedures. Harmless error rule.

VIII. CIVILIAN EMPLOYEE MISCONDUCT.

A. Types of Actions and Procedural Requirements.

1. Informal actions.

- a. Oral admonitions/warnings.
- b. Use of Employee Record Card, SF 7-B.

2. Formal actions.

a. Written reprimands.

- (1) Procedure.
- (2) Retained 1-3 years.

b. Suspensions for 14 days or less. Title 5, CFR, Ch. 752.

- (1) Procedure.
- (2) Nature and length of suspension.

c. "True" adverse actions.

- (1) Types of actions.
 - (a) Suspensions for more than 14 days.
 - (b) Furloughs.

(c) Reductions in grade.

(d) Removals.

(2) Procedures.

(a) 30 days advance written notice.

(b) Representation.

(c) Oral and Written replies.

(d) Written decision.

B. Proof Requirements.

1. Employee committed the act of misconduct (by preponderance of the evidence).

2. Nexus/Connection between the misconduct and the efficiency of the service.

3. Appropriateness of penalty choice.

a. General MSPB Rule: Relevant “Douglas” factors which include:

(1) nature and seriousness of offense;

(2) employee's job;

(3) employee's past disciplinary record;

(4) employee's past work record;

- (5) effect of offense on employee's ability to perform job;
 - (6) consistency with penalties to other employees for similar offenses;
 - (7) impact on agency's reputation;
 - (8) clarity of notice to employee that conduct proscribed;
 - (9) potential for employee's rehabilitation; and
 - (10) adequacy of alternative sanctions to deter misconduct by this employee and others.
- 4. Followed proper procedures.
- 5. Standard of proof - preponderance of the evidence.
- 6. Deference to the agency in penalty selection; abuse of discretion standard.
- 7. When not all agency charges are sustained, the Board will apply a “reasonable penalty” standard to make the penalty selection and then direct the agency to implement the penalty selected by the Board.

IX. NATIONAL GUARD AND MILITARY RESERVE TECHNICIANS.

- A. National Guard Technicians Act of 1968. 32 U.S.C. § 709.
 - 1. Must maintain guard membership.
 - 2. The Act reserves to the Adjutant General of the state involved specific authority over technicians. Separation from civilian employment allowed based on:
 - a. Loss of guard membership or specific grade required;

- b. Loss of security clearance;
 - c. For cause by the Adjutant General; and
 - d. Reductions in Force.
- B. Reserve Technicians. 5 U.S.C. § 3329; 10 U.S.C. § 10216; AR 140-315; and AFRESR 40-2.
 - 1. Originally created by an agreement between the military service and Civil Service Commission in 1957. *See also AFGE v. Hoffman*, 543 F.2d 930 (D.C. Cir. 1976).
 - 2. Employees enjoy the same rights as other civil service employees, except as provided by implementing regulations.
 - 3. Common issues in reserve technician employment:
 - a. Loss of reserve status due to circumstances within employee's control. (Active reserve membership is a term and condition of employment.) Examples: Non-promotion which leads to loss of active reserve membership, *Buriani v. Dep't. of Air Force*, 777 F.2d 674 (Fed. Cir. 1985); Misconduct, *Jeffries v. Dep't. of Air Force*, 999 F.2d 529 (Fed. Cir. 1993); and Transfer to Individual Ready Reserve following a failure to report for annual training, *Zimmerman v. Dept. of Army*, 755 F.2d 156 (Fed. Cir. 1985).
 - b. 10 U.S.C. § 10216: Requires (unless exempted out by law) all military technicians hired after 1 December 1995 to maintain military membership in the Selected Reserve unit by which they are employed as a military technician (so as to be a "dual-status" technician). Prohibits the use of appropriated funds to compensate any military technician hired after 10 February 1996 who is no longer a member of the Selected Reserve.

- c. 10 U.S.C. § 10217: Defines “non-dual status military technician” as a DoD civilian employee serving in a military technician position who was hired as a military technician before 18 November 1997 and as of 18 November 1997 is not a member of the Selected Reserve or after such date ceases to be a member of the Selected Reserve. Sets a cap on the number of non-dual status technicians in each component as of 30 September 1998. Requires DoD to submit a plan to ensure that by the end of FY 2007 all military technician positions are occupied only by military technicians (dual status).

X. CONCLUSION.